APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-5433 & 95-5646

NELSON FERNANDES,
Appellant

v.

ROCKAWAY TOWNSHIP, TOWN COUNCIL, AND TOWNSHIP ENGINEER; R.V.R.S.A (ROCKAWAY VALLEY REGIONAL SEWERAGE AUTHORITY); E.P.A. (ENVIRONMENTAL PROTECTION AGENCY); DORSEY & BELL; JOHN H. DORSEY; JOSEPH BELL
Respondents.

(D.C. Civ. No. 94-cv-00338)

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge,
BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE and SAROKIN, Circuit Judges.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,
Circuit Judge

Dated: May 13, 1996

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 95-5433 & 95-5646

NELSON FERNANDES,
Appellant

v.

ROCKAWAY TOWNSHIP, TOWN COUNCIL, AND TOWNSHIP ENGINEER; R.V.R.S.A (ROCKAWAY VALLEY REGIONAL SEWERAGE AUTHORITY); E.P.A. (ENVIRONMENTAL PROTECTION AGENCY); DORSEY & BELL; JOHN H. DORSEY; JOSEPH BELL

Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 94-cv-00338
(Honorable William H. Walls)

Submitted Pursuant to Third Circuit LAR 34.1(a)
March 15, 1996

Before: STAPLETON, SCIRICA and COWEN, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the district court's order entered May 15, 1995, letter-order entered June 20, 1995, and letter-order entered August 28, 1995, be and are hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT,
Circuit Judge

if
Attest:
DP. Douglas Sisk, Clerk, March 26, 1996

APPENDIX C

Filed: August 24, 1995

Re: Nelson Fernandes v. Rockaway Town Council and Township Engineer, et al. Civil Action No. 94-338 (WHW)

Dear Counsel:

This matter is before the Court on Defendant Environmental Protection Agency's motion for clarification.

INTRODUCTION

On August 6, 1985, Rockaway Township held a public sale of real property by auction. Rockaway Township sold all property "as is" without any representations "as to the condition, area, or boundaries." Lot 8 was one of the land parcels on which the public bid. A portion of lot 8 was covered by environmentally sensitive freshwater wetlands.

On September 21, 1985, Plaintiff Fernandes won ownership of lot 8 by bidding $10,000.00. Fernandes had a title search done at the time of purchase. On November 15, 1985, Fernandes took title to lot 8 by deed recorded with the Morris County Clerk. Planning to build a single family dwelling, Fernandes hoped to connect the home to an adjacent municipal sanitary sewer line. However, his application for the connection was rejected because of a grant condition imposed by the federal government.

In 1983, the federal government gave Rockaway Township a grant so that the Township could build a sanitary sewer system. According to Grant Agreement No. C340389-04-02, **lots within an environmentally sensitive area ("ESA") cannot be connected to federally funded sewers. The purpose of the condition is to protect the surrounding wetlands.** Fernandes' request for a waiver from EPA's ban to connect to the sewerage system was denied.

In January 1994, Fernandes filed a Complaint naming the following defendants: the Environmental Protection Agency ("EPA"), the EPA Regional Administrator ("Regional Administrator"), Rockaway Township, Rockaway Town Council, Rockaway Township Engineer, Rockaway Valley Regional

Sewerage Authority ("RVRSA"), Dorsey & Bell Law Office, John Dorsey and Joseph Bell. All of the above-named defendants moved to dismiss plaintiff's Complaint. Fernandes cross-moved for a partial summary judgment. The EPA and the EPA Regional Administrator then moved for a partial summary judgment.

In its May 11, 1995 Order, this Court (1). dismissed with prejudice all of plaintiff's claims against defendants Rockaway Township Town Council and Township Engineer, Dorsey and Bell, John Dorsey and Joseph Bell, and Rockaway Valley Regional Sewerage Authority and its Executive Director, (2) dismissed without prejudice all of plaintiff's claims against United States Environmental Protection Agency and Regional Administrator of Region II and (3) denied plaintiff's motion for partial summary judgment. EPA's motion for partial summary judgement was not decided. EPA presently moves for clarification as to the status of its motion for partial summary judgment. The motion for clarification is granted and this Court will now proceed with its determination of the partial summary judgment motion.

DISCUSSION

The EPA requests a finding that its denial of Fernandes 1 grant waiver was not arbitrary and capricious. A reviewing court must set aside agency action deemed " to be arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. sec. 706(2) (A). The court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Stoeco Dev. . Ltd. V. Department of Army Corps of Eng'rs, 701 F.Supp 1075, 1080 (D.N.J. 1988), appeal dismissed, 879 F.2d 860 (1989) (quoting Citizens to Preserve Overton Park V. Volpe, 401 U.S. 402, 415-16 (1971)). However, the court is "not empowered to substitute its judgment for that of the agency." Td. The standard of. review is "highly deferential"; agency findings are "entitled to a presumption of regularity." Id.

Before granting a waiver application, the EPA must be assured that the proposed activities do not violate the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387. Congress enacted the CWA in order to "restore and maintain the chemical, physical,

and biological integrity of the Nation's waters." 33 U.S.C. sec. 1251 (a). Thereafter, the discharge of dredged or fill materials from a point source into wetlands without a section 404 permit issued by the U.S. Army Corps of Engineers became prohibited. See 33 U.S.C. §§ 1311 (a), 1344.

Before granting a waiver application, the following factors are to be considered: (1) area extent of vacant parcel(s) which contain ESAs (i.e., floodplains and/or wetlands); (2) extent and ecological quality of ESAs affected; and (3) amount of existing development surrounding the parcel(s). See Exhibits to Declaration of Robert W. Hargrove, Exh. D. To obtain the necessary information, an inspection of the property was conducted in March 1989 at the request of the EPA. Id. at Exhs. N, 0. The inspection revealed extensive wetlands, several small streams running from the property into White Meadow Lake, and significant development of surrounding lots. Id. Based on the above data, the EPA denied Fernandes' waiver application. The EPA has offered to reevaluate Fernandes' application provided that a more recent site inspection is performed and information demonstrating that any sewer system connections will not jeopardize the wetlands is provided.. Id. at Exhs. Q, R.

Based on the above, this court finds that the EPA considered the relevant factors and made no "clear error" when reaching its decision. The site inspection conducted in 1989 did not reveal a significant decrease in wetlands warranting reclassification. The property continues to be predominantly wetlands and therefore continues to be protected under the Clean Water Act. The EPA's decision to protect the wetlands is rationally based on the available information. No contravening evidence is offered by the plaintiff.

Accordingly,

IT IS on this 24 th. day of August 1995 ;

ORDERED that the EPA's motion for clarification is **granted;** and it is further

ORDERED that EPA's motion for partial summary judgment is **granted.**

WILLIAM H. WALLS, U.S.D.J.

APPENDIX D

Dear Counsel: Filed: June 19, 1995

This matter is before the Court on plaintiff's motion for reargument.

INTRODUCTION

On August 6, 1985, Rockaway Township held a public sale of real property by auction. The terms of the public auction were that the property was sold "as is" and that "no representations of any kind are made by the Township of Rockaway as to the condition, area, or boundaries of the property herein relevant. " Lot 8 was one of the land parcels on which the public bid. A portion of lot 8 was covered by environmentally- sensitive freshwater wetlands. On September 21, 1985; plaintiff won ownership of lot 8 by bidding $10,000.00. plaintiff had a title search done at the time of purchase. On November 15, 1985, plaintiff took title to lot 8 by deed recorded with the Morris County Clerk. Plaintiff later purchased lot 9 which is adjacent to lot 8. He planned to subdivide the two lots and build a single family dwelling. plaintiff hoped to connect the single family home to the municipal sanitary sewer line that ran adjacent to his lots. However, his application was rejected because of a grant condition imposed by the federal government. In 1983, the federal government gave Rockaway Township a grant so that the Township could build a sanitary sewer system. According to Grant Agreement No. C340389-04-02, **lots within an environmentally sensitive area could not be connected to federally funded sewers. The purpose of the condition is to protect the surrounding wetlands.** plaintiff's lots are two of approximately 140 lost in the Township which were impacted by the EPA grant condition. plaintiff attempted to obtain a waiver from EPA's ban, but defendant Rockaway Valley Regional sewage Authority received a letter on May 5. 1989 from the EPA's Acting Regional Administrator denying the request.

All of the defendants moved to dismiss plaintiff's various claims against them. plaintiff cross-motioned for partial summary judgment. EPA, in addition to its motion to dismiss, moved for partial summary judgment against the plaintiff.

In its May 11, 1995 Order, this Court (1) dismissed with prejudice all of plaintiff's claims against defendants Rockaway Township Town Council and Township Engineer, Dorsey and Bell, John Dorsey and Joseph Bell, and Rockaway Valley Regional Sewerage Authority and its Executive Director, (2) dismissed without prejudice all of plaintiff's claims against United States Environmental Protection Agency and Regional Administrator of Region II and (3) denied plaintiff's motion for partial summary judgement. EPA's motion for partial summary judgement was not decided.

DISCUSSION

Under Rule 12(I) of the United States District Court Rules, the party moving for reargument must state "concisely the matters or controlling decisions which [said party believes the Judge or Magistrate has overlooked." Id. If the motion is granted, "the matter shall be reargued orally." Id.

The primary determination in a motion for reargument is whether "dispositive factual matters or controlling decisions of law" were overlooked by the Court. Pelham v. United States, 661 F.Supp. 1063, 1065 (D.N.J. 1987) . A motion for a reargument is not an opportunity for a party to present new arguments. Florham Park Chevron, Inc. v. Chevron U.S.A., Inc., 680 F. Supp. 159, 162 (D.N.J. 1988). Where the Court has not overlooked facts and cases properly presented at the time of the motion, the Third Circuit has consistently denied relief. See Egloff v. New Jersey Air National Guard, 684 F.Supp. 1275 (D.N.J. 1988) . A party's disagreement with the Court's decision "should be dealt with in the normal appellate process, not on a motion for reargument." Florham Park Chevron, 680 F. Supp. at 163

Simply stated, plaintiff sets forth no matter or controlling decision which was overlooked by this Court. Therefore, plaintiff's motion for reconsideration is denied.

CONCLUSION

For the reasons set forth in this Letter Opinion, it is on this 19 th. day of June 1995

ORDERED that Plaintiff's motion for reargument be and hereby is denied.

WILLIAM H. WALLS, U.S.D.J.

APPENDIX E

BOYAR,,HIGGINS & SUOZZO, P.A. (JH 8207)

A Professional Corporation

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(201) 538-8008
Attorneys for Defendants, Rockaway Township
Town Council and Township Engineer

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NELSON FERNANDES, Civil Action # 94-338(WHW)
Plaintiff,
ROCKAWAY TOWNSHIP TOWN
COUNCIL AND TOWNSHIP
ENGINEER, et al
Defendants .
x

ORDER DISMISSING AMENDED COMPLAINT AS TO ALL DEFENDANTS

THIS MATTER having been opened to the Court on March 27, 1995, honorable William H. Walls, U.S.D.J. presiding, upon defendants' motions brought pursuant to Fed.R.Civ.P.12(b)(l), Fed..R.Civ.P.12(b) (6) and Fed.R.Civ.P.56 to dismiss the Amended Complaint, by defendants, Rockaway Township Town Council and Township Engineer by Boyar, Higgins & Suozzo, P.A. (James J.Higgins, Esq. appearing); by defendants, United States Environmental Protection Agency and Regional Administrator of Region II, by the United States Department of Justice (Mark A. Rigau, Esq. appearing); by defendants, Dorsey & Bell, John Dorsey and Joseph Bell by Dorsey & Fisher (Douglas R. Cabana, Esq. appearing); and by defendants, Rockaway Valley Regional Sewerage Authority and Executive

Director, by McManimon & Scotland (Joseph Maraziti, Esq. appearing); and on cross-motion of plaintiff, Nelson Fernandes for partial summary judgment (Nelson Fernandes, pro se appearing), and the Court having considered the papers filed by the moving parties and those submitted in opposition, having heard oral argument on March **27,** 1995 and for good cause shown, all as set forth on the record, 1995:

IT IS on this 11 th. day of May, 1995:

ORDERED, that the motion of all defendants be and the same are hereby granted; and it further

ORDERED, that the **Amended Complaint be** and **the same is** hereby dismissed with prejudice as to defendants, Rockaway Township Town Council and Township Engineer; Dorsey & Bell, John Dorsey and Joseph Bell; and Rockaway Valley Regional Sewerage Authority and its Executive Director, with no costs; and it is further

ORDERED, that the Amended Complaint be and the same is hereby dismissed without prejudice, as to defendant, United States Environmental Protection Agency and Regional Administrator of Region II; and it is further

ORDERED, that plaintiff's motion for partial summary judgment be and the same is hereby denied; and it is further

ORDERED, that counsel for defendants, Rockaway Township Town Council and Township Engineer, shall serve a copy of this Order upon plaintiff pro se and all counsel appearing within 10 days of it having been entered.

WILLIAM H. WALLS, U.S.D.J.

APPENDIX F

Rockaway Township
John Wojtaszek, Mayor 65 Mount Hope Road
Rockaway, New Jersey 07866-1698
(201) 627-7200

September 10th. 1986

Mr. Nelson Fernandes
26 Watts Avenue
Denville, New Jersey 07834

Re: Block #20504 Lot 9 -- 17 CAYUGA AVE., ROCKAWAY

Dear Mr. Fernandes:

This letter is to confirm 1110 that on July y 21 st., 1986 this office received a check from you in the amount of $ 13,095.73 covering outstanding taxes against the above captioned property.

A breakdown of same is listed below for your perusal:

TAXES 1974/AUG. QT. 1986	=	$8,620.78	
INTEREST	=	4,474.95	13,095.73

Also, on said date, this office received a check from you in the amount of $ 1,762.26 covering outstanding Sewer Assessment charges together with accrued interest.

Please be further advised, as requested, this office has given Certification of Taxes paid to Mrs. P. Tabbot.

Tax Sale Certificate will be sent to you shortly.

Sincerely
FRANCES R. ANTONICH
TAX COLLECTOR

APPENDIX G

§ 54-100 LAND USE AND DEVELOPMENT § 54-100

L. Wetlands. The connection of any structure, to the Rockaway Valley Regional Sewer Authority sewer system, on lands classified as wetlands is prohibited unless a waiver is granted by said Authority. For the purpose of administering this provision wetlands are delineated on a set of municipal tax maps available for inspection at the office of the Township Engineer. Any lands designated as wetlands may be counted as part of a tract acreage for the purpose of computing the maximum density permitted in the zone in which it is located

I HEREBY CERTIFY the above to be a true copy of an Excerpt from the Land Use Ordinance Book which was adopted by the Township Council of the Township of Rockaway at a duly convened Meeting held on December 27, 1984

Almira Salveson, CMC
Township Clerk

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NELSON FERNANDES, Plaintiff,	:	Hon. H. Lee Sarokin Civil Action No. 94-338
v.	:	
ROCKAWAY TOWNSHIP TOWN COUNCIL, et al., Defendants.	:	

EPA'S STATEMENT OF FACTS NOT IN DISPUTE

Pursuant to local rule 12 G, EPA submits the following statement of facts that are not in dispute:

1. EPA provided sewer grant funding to RVRSA under Title II of the Clean Water Act, 33 U.S.C. §§ 1281-1299.

2. **Special Condition Number 4 to the Grant Agreement between EPA and RVRSA prohibits new construction located in environmentally sensitive areas (including wetlands) from connecting to the federally funded sewer system, unless this restriction is waived by the Regional Administrator for EPA Region II.**

3. Lot 20504, Block 8 Rockaway Township, is located within an environmentally sensitive wetland area.

4. RVRSA submitted a waiver request for Lot 20504, Block 8 Rockaway Township, received by NJDEP on July 25, 1988.

5. RVRSA's waiver application contained a letter from the U.S. Army Corps of Engineers, dated September 17, 1987, that states in part:

> In the absence of specific information detailing whether the fill activity is located in an isolated

wetland or above the headwaters of the unnamed stream located south of the property, we cannot at this time make a project specific determination concerning the applicability of a nationwide general permit for the fill material discharge proposed.

6. **EPA denied the waiver request for Lot 20504, Block 8 Rockaway Township by letter, dated May 5, 1989**, after "evaluat[ing] all of the information accompanying the request . . ''

7. EPA's administrative record of decision is attached as an exhibit to the Declaration of Robert W. Hargrove.

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Attorneys for Defendants, United States Environmental Protection Agency and Regional Administrator of Region II

APPENDIX I

42 U.S.C. § 2000d-2: Any department or agency action taken pursuant to section 2000d-1 of this subtitle shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that chapter.

N.J.S.A. 40:48-2: "Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws **not contrary to the laws of this state or of the United States**, as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants , and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law." (emphasis added)

40 CFR Ch. I, Subpart F, §35.925-13 (E) "The system would not provide capacity for new habitations or other establishments to be located on environmentally sensitive land such as wetlands, floodplains or prime agricultural lands. Appropriate and effective grant conditions (e.g., restricting sewer hook-up) should be used where necessary to protect these resources from new development.."

APPENDIX J

This Appendix lists the exhibits that were presented to the court to show the existence of facts to support a fraud upon the court. Since, a fraud upon the court is an issue of fact for the jury, petitioner will not waste this Court's time with each exhibit. However, he will present these exhibits in the joint appendix if the Court so desires.

The following cross references to the Appellate Court Appendix.

1. Appendix CH, p. 99 - Page from Mr. Bell's brief to Judge Harper.

2. Appendix CI, p.100 - Page from Mr. Bell's brief to Judge Russell.

3. Appendix CJ, p.101 - Page from transcript of hearing before Judge Russell.

4. Appendix CM, p.105 - Certified copy of ordinance passed by town Council before their admitted fraud that shows the Council was fully aware of the grant condition that led to its fraud upon the public. See App.G, p.38.

5. Appendix CE, p.93 - List of lots to be sold in 1990 that shows one of the lots was affected by wetlands.

6. Appendix CF, p.94-96 - List of the same lots to be sold attached to the resolution for sale in 1990. This version was altered to conceal the wetlands in an effort to defraud the public.

7. Appendix CO, p.108 - Copy of township minutes when the engineer admits to a Council policy to deny endorsements.

APPENDIX K

U.S.E.P.A.

DATE: APR 23, 1979

SUBJECT: Limited access interceptor sewers as they relate to the Construction Grant Program in New Jersey
FROM: Robert W. Hargrove, Soil Conservationist
NJ/PR Section, 2-WA-EI
TO: Daniel Sullivan, Chief
EIS Preparation Branch

THRU: Stephen Y. Arella, P.E., Chief
NJ/PR Section, 2-WA-EI

Limiting access to intercepting sewers is a complicated issue because of the broad latitude for varying legal Interpretations. If suitable controls could be implemented, it could be of great help to prevent induced growth in environmentally sensitive areas.

This paper will deal with an overview of the situation. **Court cases and New Jersey's State regulations and statutes will be explored.** EPA options as they pertain to this subject will be explained. These options will be further illustrated by case studies In several EPA regions.

Sewage Disposal as a Public Service

The question of whether or not sewage disposal is a public service is an important consideration in determining the legality of limiting access. One important aspect is the source of funds. **If, as in the past, the funds arise from local taxes, it is likely to be considered a public utility and limiting access would be difficult. However, since passage of the Clean Water Act, most of the design and construction of wastewater treatment facilities are financed by Federal grants. The remainder comes from state grants and bond issues which are recovered through user charges. Theoretically, facilities built using such financial backing could limit sewer hook-ups.**

The issue of sewage disposal as a public service was also addressed in the courts. In Cloyes vs. Delaware Township it was

noted "Sewage disposal is not one of the public services anciently furnished by local governments, nor Is it uniformly so furnished today." This was further substantiated in Pleasure Bay Apartments vs. City of Long Branch, "Neither statutory nor case law impose; a mandatory duty on a municipality to furnish municipal service for disposal of garbage or other wastes:" These cases deal primarily with a municipality not being required to provide such service if none was provided in the first place.

New Jersey State Law

New Jersey's Sewerage Authority law enables counties or municipalities, either alone or in combinations, to establish a sewerage authority. Sewerage authorities are empowered to construct, operate and maintain facilities to collect, treat and dispose of sewage. The law specifies that these authorities have the power, "to enter into any and all contract, execute any and all instruments, and do and perform any and all acts or things necessary, convenient or desirable for the purpose of the sewerage authority or to carry out any power expressly given in this act."

The question of allowing hook-ups rests with both the authority and the municipalities. The authority is free to reasonably fix the terms and conditions of service. The key word in this statement seems to be reasonably. A case from Arizona is a good example of this. In Travaini vs. Maricopa County the county concluded that the county "having installed and maintained a sewer line past the property in question, the city is thereafter required to allow any abutting property owner to use said sewer subject only to reasonable limitations." The "reasonable limitations" in this case being the capacity of the line.

The Arizona case deals with a collection system in a populated area, not an interceptor away from the population, and quite possibly in a sensitive environmental area.

It should be noted that in the case of Southern-Burlington County NAACP vs. Township of Mt. Laurel the courts have concluded that limited access interceptors can not be used as a means of exclusionary zoning.

New Jersey law states that sewerage authorities can be formed. The only stipulation concerning hook-ups is the

abatement of pollution and related health hazards. Another consideration stemming from EPA's cost effectiveness guidelines is that hook-ups may be necessary for a system to be economically feasible.

State law does give to the authority the ability to enter into contracts. These contracts are primarily with municipalities for sewage collection and disposal. It seems to imply that they can also enter into contracts with EPA through grant agreements. These contracts stand on the same footing as contracts between natural persons or municipalities.

New Jersey Septic System Regulations

The Septic System Regulations in New Jersey also affect the issue. The state will not authorize the building of a septic system on a property If a sewer line is within 100 feet of it. With the exception of the general guidelines for sewer hook-ups, the sewerage authority determines sewer use.

EPA Authority

Protection of environmentally sensitive. areas is mandated by Federal policy. Certain actions can be taken to promote this policy with respect to the Construction Grants Program. The first and easiest mechanism is. to limit the capacity of the system to exlude development in environmentally sensitive areas. This is an attempt to limit the number of hook-ups to the system to areas where growth will not impact critical areas.

There will be some small projects that can not be limited with respect to carrying capacity because of minimum sizing of unit processes for treatment. Projects such as these might require grant conditions. The conditions will have to be met in order to insure receipt of a. 201 grant.

The subject of grant conditions was addressed in PRM 75-26 which dealt with mitigating secondary impacts in the Construction Grants Process. The Regional Administrator can withold of Step and 3 grants until effects, or agrees to conditions in the grant document requiring actions to minimize the effects.

Some actions to mitigate these secondary effects include, but are not limited to: phasing and orderly extension of sewer service, project changes improved land use planning, and sewer use

restrictions. It goes on to say that conditions on a grant must be reasonable and the applicant must demonstrate "good faith" and be moving toward mitigative action before the grant is awarded.

Actions that can be taken if the applicant refuses to abide by the grant agreement are: withold payments, refuse to process subsequent grant applications from the municipality, refuse to approve grants for future phases of the projects, enter an injunction against the grant recipient, suspend project work or terminate the grant and recover unexpended EPA funds.

The new regulations (9/27/78) on Municipal Wastewater Treatment Works also contain provisions for conditions on grants. Section 35.935-16 on page 44073 states that "the Regional Administrator shall not pay more than 80% of the Federal-share of any Step 3 project unless he has approved the grantee's sewer use ordinance." This means 15% or more of the total project costs could be held if this is condition wasn't met. However, since this process now entails just a rev w of the ordinance for compliance with the regulations this may be of minimal value to us at this time.

Case Study Evaluation

Case studies from EPA regions show the various techniques that can be used to mitigate adverse impacts in the Construction Grants Program.

In 1975 a project from Region I on Block Island, Rhode Island could have encroached on environmentally sensitive areas. That region first scaled down the project. Then a grant condition was imposed to accept no new hook-ups from wetlands in accordance with the State law.

That same Year a project from Region III in Falling Creek, VA which involved the eutrophication of reservoirs and induced secondary effects on Swift Creek Reservoir. Plant size was reduced and the Step II grant was conditioned on the development of a Swift Creek Watershed Management Plan.

In 1975 a Region VIII project in Renner, SD was leading to new development on a floodplain. A grant condition, based on the county floodplain ordinance, that said no new hook-ups from the 100 year floodplain. The Region also recommended that capacity be limited to existing population plus a moderate increase.

In 1974 a Region IX project in Fairfield, CA included pressure to increase industrial and low density residential land on or near Suisun Marsh and pressure to develope agricultural land with impacts on air quality and wildlife. The Step 3 grant was conditioned to not provide service to new development immediately adjacent to the marsh based on pending State protection legislation..

In 1976 a Region X project in North Fremont, SD was leading to pressures to increase development in environmentally sensitive areas. These areas included fishing and wildlife management areas. The project was altered to have four small sub area facilities instead of one large Regional plant with long interceptors. The Step 2 and 3 grants were conditional on County compliance with State law requiring development of growth controls and a comprehensive land use plan.

Summary

Case studies show that EPA can and does use grant conditions and project changes to limit development due to funded projects. **It should be said that if it is possible to base the grant condition on a state or local law then do it. This will take a lot of heat for such an action away from falling directly on EPA.** Those laws could include floodplain ordinances (Block Is., RI) or complying with State requirements for land controls (North Fremont,' SD). **Such conditions could be based on Federal law but this tends to foster the public opinion that the Federal government is just trying to control 'local zoning.** State or local laws that apply to such situations should be added in to direct the public rage away from EPA, when possible.

Limited access interceptors is a question that has never formally been answered in the courts. to do so might require upwards of 3-4 years to make it through all appeals. The 'question is not entirely addressed in New Jersey State law either. The policy of protecting sensitive environmental areas can be fostered by changing the plan or imposing grant conditions. EPA has done this in the past and an analysis of these cases show how such problems can be handled in the future.

Recommended Regional Policy Options

1) Grant Conditions with 3rd party enforcement after grant expiration.
2) 208 plan inclusion of model local sewer use ordinance and adoption by local municipalities.
3) Approval of Sewer Use Ordinances by EPA.
4) Constraining service. agreements between MUA's and member municipalities.

APPENDIX L

U.S.E.P.A.

DATE: May 2 5 1979

SUBJECT: Grant and Permit Conditions to Restrict Sewer Hookups in Environmentally Critical Areas
FROM: Daniel Sullivan, Chief
EIS Preparation Branch
TO: Conrad Simon, Director
Water Division

Scope of the Problem

EPA's funding of wastewater treatment works through the Construction Grants Program has been criticized for not adequately discouraging growth in environmentally sensitive lands (i.e. floodplains, wetlands, and significant wildlife habitats). In the past, the Agency's policy has been to eliminate any capacity in proposed systems that would serve these sensitive lands. However, in several cases this mitigating measure has proven to be inadequate to curb unsound growth.

ISSUE

Should EPA-Region II begin to affix special conditions to Step 2 and 3 construction grants, 208 areawide plans, and 402 permits to prohibit development in environmentally critical areas?

Salient Factors

The September 27, 1978 Construction Grants Program Rules and Regulations specifically encourages the use of grant conditions restricting sewer hookups to protect environmentally sensitive land from new development. However, because of some of the legal complexities associated with such grant conditions, Region II has never exercised this control. We now have several ideal examples where such conditions are both appropriate and easily justified.

Unfortunately, merely limiting the size of wastewater treatment facilities does not adequately protect sensitive areas. An excellent example of how a reduction in facilities capacity has a very limited influence on where housing and sewer hookups can occur is the proposed Cape May Region project. The EPA had reduced

the size of the proposed facilities to specifically exclude wetlands, flood hazard areas, and significant wildlife habitat areas from development. Yet, an application for a 250 unit residential development (in the flood hazard area, - see attached Map 1) is currently before the New Jersey Department of Environmental Protection. Discussions with DEP personnel reveal that the developer intends to rely on the proposed regional sewer system to satisfy the wastewater treatment need of the proposed housing project.

Major Actors

1. USEPA-Region II (RA, WDD, RC)
2. U.S. Fish and Wildlife Service
3. New Jersey Department of Environmental Protection
4. Local Municipalities
5. 208 Agencies
6. Natural Resources Defense Council
7. American Littoral Society
8. National Wildlife Federation

Political Considerations

Grant conditions of this type have been used in other regions but have relied heavily upon State Law for their enforcement (see Attachment 1). New Jersey State Law does not adequately protect environmentally sensitive areas primarily because federal regulations encompass more types of sensitive areas. However, there are strong statements in the New Jersey Water Pollution Control Act (NJWPCA) Regulations which mandate conformance of future 201 grants with applicable 201, 208 and 3103 plans.

EPA has a clear mandate in law, regulation, executive orders and EPA Policy (see Attachment 2) to protect the following critical areas:

1. Significant Habitats of Wildlife, including Rare and Endangered Species Habitats Endangered Species Act and Fish and Wildlife Coordination Act
2. Floodplains - Executive Order 11988
3. Wetlands - Executive Order 11990

We also have some rather strict policies on protection of prime agricultural - lands (EPA Policy Statement - September 26, 1978)

and less strict policies on other sensitive areas, such as steep slope areas and unique vegetational communities

There are a number of influential national interest groups that have been actively prodding EPA to apply such conditions. Among these are:

1. Natural Resources Defense Council
2. American Littoral Society
3. National Wildlife Federation

In addition, the U.S. Fish and Wildlife Service has also expressed their opinion that grant conditions of this type should be used unique ecological nature of the Cape May Region to protect the unique ecological nature of the Cape May Region.

Background

EPA-Region II has been reticent in applying such conditions in the past for several reasons. Most New Jersey facility planning grants are given to Municipal Utility Authorities (MUAs)-established through State Law. Some questions have been raised as to whether or not an MUA can accept a condition which affects land use controls and, if they can, whether the condition Is enforceable against its member municipalities. The NJSA 40:14A-23 (see Attach. 3) appears to permit the MUA to accept such conditions. Another frequent objection to the use of the grant conditions has been that the duration of the enforcement of a grant condition expires at the end of the grant period. However, since many of our grants are phased the applicability may well be extended for a considerably longer period than the initial grant.

Admittedly, limiting access to interceptors or collection systems via grant conditions themselves will not guarantee better land use planning. However, it is an essential element of a multi-pronged approach to resolving this problem.

The NPDES Proposed Revision of Existing Regulation published in the August 21, 1978 Federal Register requires discharge permits to be consistent with the reflective of the Clean Water Act and any appropriate Federal Executive Orders. It also states

that permits should include more stringent requirements where necessary to insure consistency with areawide waste treatment management (208) plans (AWTMP). Many existing permits are expiring in the near future and, prior to reissuance, considerable effort is anticipated to assure consistency with both 201 facilities plans and 208-funded AWTMP's.

Recommendations

Based on the May 24 briefing on the Cape May regional project, the following represents my understanding of the direction set by Eckardt C. Beck. The activities proposed can and should be initiated concurrently and are not necessarily contingent upon the success of the other parts for their effectiveness.

First, where the review of 201 facility plans (including ESAs) identifies environmentally sensitive ares requiring protection, grant conditions should be affixed specifically constraining sewer hookups. We anticipate that detailed maps of the facility 1 typlanning area will be used to identify sensitive areas and existing discharges (i.e. homes and subdivisions) There are two New Jersey 2Ols in-house that are excellent examples of the need for such conditions: Jakes's Branch Interceptor and Stafford Township Collection System.

The proposed Cape May Region Wastewater Treatment Facilities Plan requires a slightly different approach. A negative declaration was issued on January 25, 1979. The use of a special condition restricting sewer hookups represents a substantial change from the statements made in the negative declaration. Once the facility plan is revised to show which specific lots will be served by the proposed facility, we will issue an addendum to the negative declaration specifically detailing our intent to use grant conditions. The addendum will allow for a 30 calendar day comment period.

Second, the 2O8-funded areawide waste treatment management plans (AWTMP) for these areas should be required to reflect the need to protect these sensitive areas. In order to accomplish this in the Cape May Region, the 208 agency should adopt the revised 201 plan as part of the AWTMP. No Step 3 grant will be awarded to the CMCMUA until this portion of the AWTMP is

approved by EPA. We intend to send a letter to the Cape May 208 agency informing them of this requirement.

Third, the Permits Branch, in coordination with Regional Council, should develop permit conditions to reflect sewer hookup restriction which are detailed in the special grant condition for the Step 2 201 grants. Permits Branch should also develop a strategy for identifying future permit violations, e.g., if a connection occurs from an area defined to be environmentally sensitive.

Pros and Cons

Pros: Use of grant conditions and subsequent enforcement will clearly demonstrate EPA's intent to protect: environmentally sensitive areas. **Even if we had to rely on third party enforcement of the conditions, it would provide a firm legal basis for future adjudication.**

It is responsive to valid concerns presented by NRDC, ALS, NWF, and USFWS. Failure to respond to their inquires is likely to result in litigation con at least on in-house project (Cape May Region).

Once established, the use of grant conditions will streamline the 201 grants process. Projects are frequently delayed because of concerns that sensitive areas have not been adequately protected (e.g. Cape May Region).

Projects which may prove more cost effective on a regional rather than subregional basis may no longer be channeled away from single plant schemes solely to protect environmentally sensitive areas.

Cons: Grant conditions of this type have never been used in Region II before and there is a potential for litigation concerning the legality of federal intervention in local land use planning.

These conditions may not be enforceable by EPA beyond the life of the current grant. However, in many cases, we anticipate future grants to the affected MUAs. Furthermore, a grant

condition may be enforceable after the grant expires because it is a contract between EPA and the authority.

State acceptance of these conditions is complicated by the fact that they define sensitive areas differently than EPA defines them. Application of this process to other 201s, 208s and permits in the region is a manpower intensive effort.

Strategy and Timetable.

1. Affix grant conditions to the two pending New Jersey 201 grants mentioned earlier, immediately.

2. Require the CMCMUA to revise the Cape May Region facility plan.

3. Issue an addendum to the Cape May Region Negative Declaration.

4. Require the 208 agency to work with the CMCMUA to assure adoption of the revised 201 plan prior to October 1, 1979.

5. Negotiate with the State to require them to amend its regulations to redefine environmentally sensitive areas to agree with the federal definitions through the State/EPA Agreement process.

6. Negotiate with the State to require them to amend its review procedure to reject grant applications and deny sewer extension permits which would serve sensitive areas through the 205(g) Delegation Agreement.

7. Require all 208 grantees to give high priority to the identification of environmentally sensitive areas where large-scale development is projected.

Additional Attachments

1. Basis in Regulation, Executive Order and EPA Policy Supporting the Use of Grant Conditions to Protect Environmentally Critical Areas.

2. April 23, 1979 memo from R. Hargrove to D. Sullivan discussing potential use of grant conditions to limit access to interceptors.

3. Article excerpted from New Jersey Effluents (April 1979) entitled "Limited Access Interceptors?"

cc: Peter Devine
William Muszynsk
Helen Fenske
Pat Harvey
Charles Durfor
Dave Luoma
Richard Salkie
Mike Ronchonsky
Kevin Bricke
Steve Arella

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Nelson Fernandes,

Hon. H. Lee Sarokin

Plaintiff,

Civil Action No. 94-338

V.

Rockaway Township Town Council
et al.

Defendants

I, Robert Hargrove, hereby declare and certify as follows:

DECLARATION OF ROBERT W. HARGROVE

1. My name is Robert Harqrove. I have personal knowledge of the facts contained in this declaration.

2. Presently, I serve as Chief of the Environmental Impacts Branch of the Office of Policy and Management of the Region II office of the United States Environmental protection Agency (EPA). As part of my duties with the EPA, I am responsible for maintaining the records pertaining to the federal sewer grant program for Region II.

3. In my capacity as records custodian, I had occasion to review the official records pewtaining to a waiver request from NJDEP, dated Febuary 9, 1989, for block 20504, lot 8 in Rockaway Township, owned by Mr. Nelson Fernandes. An indexed copy of the records of the waiver request request are attached hereto as exhibits A - X.

4. In the course of my work with the EPA, I have been extensively involved in EPA's National Environmental Policy Act (NEPA) program. As a part of this program, EPA is responsible for the analysis of potential impacts, including cumulative impacts, of major federal actions implemented by EPA. One such action was the awarding of a federal grant to the Rockaway Valley Regional Sewerage Authority (RVRSA) in 1983 for the construction of wastewater treatment facilities. A major or concern in awarding this grant was the need to mitigate indirect impacts such as induced development of environmentally sensitive areas (ESA), particularly wetlands (Exhibits A, B, and C). **Protection of these areas is mandated by federal statutes, regulations, and policies. In order to meet federal policy mandates, a special condition was placed on the grant reguiring the grantee to agree that for a period of 50 years no sewer hook-ups to the federally funded facilities would be allowed without a waiver of the condition from the Regional Administrator (Exhibit E).** As Chief of the Environmental Impacts Branch, it is my responsibility to develop recommendations for consideration by the Regional Administrator on the disposition of these waiver requests. These recommendations are based on an evaluation of the merits of each case with regard to specific criteria (see Exhibit D). Of Primary jmportance in EPA's decision are the recommendation of the New Jersey Department of Environmental Protection (NJDEP) and the ecological value of the ESA in question.

5. EPA received a waiver request package from the NJDEP dated February 9, 1989 for Block 20504, Lot 8,in Rockaway

Township, property owned by Mr. Nelson Fernandes. The RVRSA had initiated the waiver request by submitting a letter (Exhibit J) that contained the following items: Letter from Homeowner, Rockaway Township Resolution, Sewer Allocation, ACOE Jurisdictional Determination, and a Wetland Delineation Report. The NJDEP of the waiver request (Exhibit L) .

6. A second site inspection was performed at the Fernandes property on March 15, 1989 by NJDEP at the request of EPA, and the NJDEP' s recommendation ion to deny the waiver request was reconfirmed (Exhibits N and 0) .

7. EPA reviewed all the information contained in the initial package and the results of the second site visit, and on May 5, 1989, denied the RVRSA waiver request for the Fernandes property based on the extent and ecological value of the wetlands (Exhibit P).

8. On May 30, 1989, EPA met with Mr. Fernandes and the NJDEP to discuss. the waiver denial (Exhibit Q). At the meeting, EPA agreed to perform its own site visit for the purpose of potentially re-evaluating our decision to deny the waiver.

9. On May 31, 1989, Mr. Fernandes informed EPA that, upon the recommendation of his lawyer, he could not allow EPA to inspect his property unless we agreed to sign a statement that we would not use any infsrmation gathered at the site visit against him if a claim was filed Mr. Fernandes was informed that EPA could not aqree to this blanket condition, and that, therefore, the waiver would stand (Exhibits R and S) .

10. EPA is willing to re-evaluate Mr. Fernandes request if provided with sufficient information to determine the impact of the proposed fill activities.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 3, 1994

Robert W. Hargrove 8/3/94